No. 82-978

In The
Supreme Court of the United States

OCTOBER TERM, 1982

JOHN WAYNE TONUBBEE,

Petitioner,

VERSUS

STATE OF LOUISIANA

Respondent.

Petition for Writ of Certiorari to the Supreme Court of United States

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The State of Louisiana opposes the petition for writ of certiorari filed on behalf of John Wayne Tonubbee to review the judgment of the Supreme Court of Louisiana affirming his conviction under LSA R.S. 14:30 for first degree murder.

JURISDICTION

The State of Louisiana hereby adopts the statement of jurisdiction contained in Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The State of Louisiana hereby adopts the statement

of constitutional provisions involved contained in Petition for Writ of Certiorari..

STATEMENT OF THE CASE

The facts of the case indicate that Pauline Odom and Leo Dufrene were killed late at night on April 19, 1980 after being struck by a GMC pickup truck on a Louisiana highway. During the investigation of the case, but prior to officers questioning Tonubbee, police officers had learned: (1) Tonubbee, AKA Wayne Thompson, had been seen driving a truck on April 19, 1980; (2) Tonubbee had been observed drinking and arguing with Odom, threatening her, and leaving a bar with her around 11 P.M. on April 19, 1980; (3) Tonubbee fit the description provided by Paul Templet, who had been struck from behind while attending to Pauline Odom on the side of the highway around 11:30 P.M., just prior to Odom's death.

Early in the morning of April 20, 1980, police officers arrived at a camp where it had been learned Tonubbee (AKA Thompson) was living with a man named Stapelton. Police knew Stapelton owned a truck, and learned from Stapelton that Tonubbee had used the truck on April 19, 1980, but Stapelton had not seen the truck after Tonubbee returned home. After speaking with Stapelton outside the residence, officers and Stapelton entered the house, spoke to Tonubbee, after which they brought Tonubbee to the police station for questioning.

John Wayne Tonubbee was arrested for murder and was subsequently convicted by a unanimous jury of two counts of first degree murder (LSA-R.S. 14:30(3)). He

was sentenced to life imprisonment after motion for new trial was denied by the trial court. An appeal was taken to the Louisiana Supreme Court, which court affirmed the conviction. Tonubbee is presently petitioning to this Honorable Court for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

Petitioner's initial reason suggested for granting writ of certiorari is that the police illegally gained entry into the house where Tonubbee had been living, through coercion of Stapelton. Petitioner thus arguing the entry was not consensual. The State of Louisiana disagrees with this position.

The evidence presented during the hearing on the motion to supress indicates police used no coercion or threats in order to gain entrance into the camp. The officers knew Tonubbee (AKA Thompson) lived at the camp with Stapelton. They knew Tonubbee had been driving a truck on April 19, 1980, they knew victims had been killed by a GMC truck, and they were aware that Stapelton owned a truck. Conversation with Stapelton confirmed he had loaned the truck to Tonubbee the previous day, but it had not been returned although Tonubbee was in the residence sleeping.

Although the plainclothes officers did possess weapons, there was no testimony these weapons were pointed at Stapelton or in any way used to threaten or intimidate Stapelton into allowing the officers entry into the camp. No one had been arrested at the time, and no one had been threatened with arrest if the officers were not allowed entry into the house. The officers did not imply in

any way that a search warrant or arrest warrant had been secured by them as an attempt to gain entry into the house. Stapelton was allowed to enter the camp by himself to get his gun from the camp, which gun he put in his pocket. The officers did not even take custody of this weapon. Stapelton also entered the residence with the officers to wake up Tonubbee.

Petitioner argues this case should be governed by the ruling of *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371 (1980). However, in that decision this Honorable Court held that case did not involve an entry to a house made with consent. "Finally, in both cases we are dealing with entries into homes made without the consent of any occupant." *Payton*, supra, at page 1378. As the state respectfully argues the situation is one of consent by a co-occupant, attention is called to those cases providing guidelines in determining when consent is deemed to have been voluntarily given. In *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973) at page 2048, it was held ". . . the question whether a consent to a search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances."

The state would readily concede that Stapelton was not advised by officers that he had a right to refuse entry to the officers, nor was it affirmatively shown that Stapelton knew he could refuse entry. As this Honorable Court has continuously ruled these are not prerequisites for a "valid consent search," and no further discussion of this issue will be presented.

The issue from petitioner's viewpoint appears to be one of "implied" threats. Petitioner would appear to argue that because there were three armed officers at the house, any consent by Stapelton would be coerced. Such has not been held to be the case, however. In *Schneckloth*, supra, the subjects were also confronted with three armed officers, and this court found no indication of duress or intimidation which would vitiate the consent. "There's no reason to believe, under circumstances such as are present here, that the response . . . is presumptively coerced and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person's response." *Schneckloth*, supra.

As in *Schneckloth*, the instant case exhibits no evidence of coercion "either from the nature of the police questions or the environment in which it took place."

The State would also respectfully call the Court's attention to *Coolidge v. New Hampshire*, 403 U.S. 443, 71 S.Ct. 2022 (1971).

In that case police had a subject at the police station for questioning for murder. Two officers went to the subject's residence and spoke to the subject's wife, asking questions concerning whether there were any guns in the house. After receiving the response "yes, I'll go get them" officers replied "we will come with you". Petitioner in that case made the argument that consent was not voluntary because of "demand" by the officers. But the court held "In a situation like the one before us, there no doubt always exists forces pushing the spouse to cooperate with police officers. . . But no part of pol-

icy underlying the Fourth & Fourteenth Amendments is to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." This same statement can be applied to the situation now before the court.

Petitioner also argues Writ of Certiorari should be granted because under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979) the State of Louisiana presented insufficient evidence to support a first degree murder conviction under Louisiana law.

Respondent would initially caution this Honorable that although in his petition, petitioner states "the prosecution contended that photographs of the victims showed specific intent" to kill or inflict great bodily harm on more than one person, these photographs were not the sole evidence of intent presented to the jury. Petitioner completely ignores testimony of Paul Templet that while attending to Odom on the side of the highway, he was intentionally struck on the head with a hard object by someone who matched Tonubbee's description. This intentionally inflicted serious injury was shown to have occurred immediately before the deaths of Odom and Dufrene, and constituted part of the crime of first degree murder.

See appendix A in Petition for Writ of Certiorari, *State v. Tonnubbee*, 420 So.2d 126 (La. 82).

The ultimate issue in this review is whether the constitutional due process standard regarding sufficiency of evidence professed in *Jackson v. Virginia*, supra, adopted by this Court has been met.

That question in context with this case has been

stated as follows: Whether after construing the evidence in the light most favorable to the prosecution, any rational jury could have found the essential elements of first degree murder beyond a reasonable doubt.

"Considering the evidence in the light most favorable to the state", necessarily means that where there exist conflicts in testimony or inferences to be drawn from evidence, the reviewing court must presume that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution. This according to *Jackson* is important in order to preserve the fact finder's role as weigher of the evidence in our system of justice. (*Jackson* at pp. 2789, 2793).

Some of these conflicts which should be presumed resolved in the state's favor and against the defendant are as follows:

(1) Pauline Odom and defendant were together, drinking in Blondy's lounge the night she was killed.
(2) Pauline Odom, somewhat intoxicated, did not want to leave the lounge, but did leave after being threatened by defendant—"Either you come with me or I'm gonna knock your butt down and take you out."
(3) Pauline Odom and defendant left the lounge together near 11:00 p.m. on the night she was killed.
(4) Paul Templet was struck on the head by defendant immediately preceding the murder of Odom and Dufrene.
(5) Defendant was observed driving a truck belonging to Ham Stapelton, as late as 6:00 p.m. on the day of the offense, contrary to defendant's testimony.
(6) The truck belonging to Stapelton was the "murder weapon."
(7) Defendant, when being transported to the

sheriff's office, made the statement "If I ever get out of this I'll never drink again."

The defendant's position is in effect that anything is *possible*, but under *Jackson* every possible explanation need not be excluded and these other possibilities, i.e., someone else as perpetrator or accident, are not reasonable explanations of what occurred based on the circumstances and facts presented to the jury.

In the instant case, the jury chose to believe and reasonably so, that the death dealing "weapon" was being driven by defendant. There is evidence in the testimony of Paul Templet that a vehicle was heard to stop a distance from him then a man, about 5'7", 170 lbs., with dark hair and mustache, and blue or black clothes struck him on the head as he was holding Pauline Odom in his lap. Thus it can be assumed, this individual intended to inflict great bodily harm on Paul Templet and there is sufficient evidence for the jury to reasonably conclude this person was defendant. Since a vehicle belonging to defendant's friend was then almost immediately used to strike Pauline Odom and Leo Dufrene, after Paul Templet was already struck, there is also evidence which can reasonably indicate a specific intent to kill or inflict great bodily harm on more than one person.

In conclusion, under the standard set forth in *Jackson* and deferring to the jury's resolution of conflicting inferences in favor of the State, it can be said that any rational fact finder including this jury *could* have found all elements of this crime proved beyond a reasonable doubt.

CONCLUSION

Wherefore, in light of the aforementioned arguments concerning the errors alleged by petitioner to have occurred in the instant case, it is the position of the State of Louisiana that no error was committed which would mandate a reversal of the murder conviction of John Wayne Tonubbee. The State of Louisiana urges the Court to deny the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of Opposition to Petition for Writ of Certiorari have been served upon counsel for petitioner, by placing three copies thereof in the U.S. Mail, first class postage prepaid, addressed to Victor E. Bradley, Jr., P. O. Drawer B, 27 Apple Street, Norco, Louisiana 70079.

Baton Rouge, Louisiana
This 25th day of March, 1983.

B-7618,3-83,50